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NO. 94-1273

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

HERBERT MOORE AND DAVID JONES,

PETITIONERS

VS.

STATE OF ALABAMA,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

BRIEF AND ARGUMENT IN OPPOSITION TO THE PETITION

OF

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37 pp

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QUESTIONS PRESENTED

1. May a party complain about the search of a residence pursuant to a search warrant, where the party makes no showing of interest in the residence, and it affirmatively appears that the residence belonged to another person?

No.

2. Does the fact that a party can make arguments against a finding of probable cause render a search warrant void, where there was before the magistrate at least a substantial basis for concluding that the search would uncover evidence of wrongdoing?

No.

3. Does the inaccurate use of a single word in a printed search warrant affidavit form render void a warrant based

on an affidavit using the form, where the word is not misleading and does not relate to probable cause?

No.

THE PARTIES

In the Circuit Court of Madison County, Alabama, the Court of Criminal Appeals of Alabama, and the Supreme Court of Alabama, the parties were Herbert Moore, Robbie Moore and David Jones, who, except for Robbie Moore, are Petitioners herein, as Defendants, Appellants and Petitioners, respectively, and the State of Alabama, who is Respondent herein, as Plaintiff, Appellee, and Cross-Petitioner, respectively.

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TO THE PETITION

OPINIONS BELOW

The opinion and order of the Court of Criminal Appeals of Alabama affirming the Petitioners' convictions, sub judice, and

denying rehearing are not yet reported but will be reported as follows: Moore v. State ___ So. 2d ___ (Ala.Cr.App, 1994). A copy of the same are submitted as Appendices "A" and "B" to the petition.

The order of the Alabama Supreme Court denying review is not yet reported but will be reported as: Ex parte Moore ___ So. 2d ___ (Ala, 1994). A copy of the same is submitted as Appendix "C" to the petition.

JURISDICTION

The Petitioners have invoked this Honorable Court's jurisdiction under 28 U.S.C. 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioners are making alleged claims under the Fourth and Fourteenth Amendments to the United States Constitution.

STATUTORY PROVISIONS INVOLVED

No statutory provisions are involved in this cause.

STATEMENT OF THE CASE

The opinion of the Court of Criminal Appeals of Alabama summarized the case history at the trial level as follows:

> "...This case involves four defendants, three of whom were convicted as a result of searches at two locations. The appellants, Herbert Moore ....David Jones, and Robbie Moore, were charged in a three-count indictment with trafficking in cocaine. Count one of the indictment charged all three Appellants with trafficking in cocaine seized during the search of David Jones's residence. Count two of the indictment charged Herbert Moore and David Jones with trafficking in cocaine seized during the search of David Jones's residence. Count three of the indictment charged all three appellant's with trafficking in cocaine seized during the search of David Jones's residence. Count two of the indictment charged Herbert Moore and David Jones with trafficking in cocaine seized during the search of David

Jones's residence. Count three of the indictment charged Herbert Moore, David Jones, and his daughter, Sheila Jones....with trafficking in cocaine seized during the search of Sheila Jones's apartment. [Sheila Jones was found not guilty.]

"The three appellants [,Petitioners Moore and Jones and Robbie Moore,] were tried jointly and were found guilty as charged in the indictment. Herbert Moore was sentenced to a habitual felony offender to life in prison without parole on each count, the sentences to be served consecutively. David Jones was sentenced to 30 years in prison on each count, the sentences to be served consecutively. Robbie Moore was sentenced to 30 years in prison...." (Moore v. State [CR 92-1183, March 25, 1994] ___ So. 2d ___ [Ala.Cr.App, 1994]; Mns, op. pp. 1-2; Appendix "A" to the petition, pp. A-1-A-2; footnote omitted)

On March 25, 1994, the Court of Criminal Appeals reversed the convictions

of Robbie Moore and Petitioners Herbert Moore and David Jones under counts one and two of the indictment. The Court held that the Officers who executed the search warrant for David Jones' residence were not excused from compliance with the Alabama "knock and announce" rule and that the failure to comply with the rule rendered the search of said residence contrary to the Fourth Amendment to the Constitution of the United States.[1]

---

[1] In Wilson v. State, (317 Ark. 548, 878 S.W. 2d 755, 758 [1994]), the Supreme Court of Arkansas rejected this proposition. That case is now before this Honorable Court in Wilson v. Arkansas, No. 94-5707, review granted Nov. 29, 1994, 63 U.S. L. W. 3420.

However, the convictions of Petitioners Herbert Moore and David Jones under count three of the indictment, based on cocaine found in Sheila Jones' residence were affirmed. (Appendix "A" to the petition.)

Both parties applied for rehearing, but the applications were denied on May 27, 1994. (Appendix "B" to the petition.)

Both parties sought review in the Alabama Supreme Court, which was denied on October 28, 1994. However, Justice Maddox dissented, writing that he would grant the State's petition and examine the issue now before this Honorable Court, in Wilson v. Arkansas, No. 94-5707. (Appendix "C" to the petition.)

STATEMENT OF THE FACTS

I

ON STANDING

The Petitioners are questioning the search of Sheila Jones' apartment. At no time have the Petitioners claimed, let alone shown, any legal interest in Sheila Jones' apartment.

II

ON PROBABLE CAUSE

The Court of Criminal Appeals set out the body of the probable cause section of the warrant affidavit in its opinion. See Appendix "A" to the petition, pages A-13-A-14. We adopt and submit the same.

III

ON "FALSE" "IS"

The Petitioners' claim of misstatement in the affidavit is based on one word in one sentence of the lengthy affidavit. This sentence is one of three set out in the printed affidavit form that are intended to advise the magistrate of the subjects of the warrant, the place to be searched, and the general nature of the information which will be set out in the body of the affidavit. This section of the affidavit reads:

> "() I have personal knowledge;
>
> "() I have been personally informed by _____;
>
> "(x) I have been personally informed by a reliable and confidential informant; that

> certain personal property, more particularly described as follows, to-wit: cocaine, US Currency derived from the sale of illegal drugs.
>
> _____ _____
>
> _____
>
> is concealed in or about the dwelling, house, mobile home, or apartment or other building or premises or privately owned vehicle of: Sheila Jones located at: 3784 University Drive, Apt. 1826, Calais Forest Apartments Huntsville, Madison County, Alabama, or which said vehicle is described as :
>
> _____
>
> _____
>
> I further depose and say that ....: (R. p. 28)

The lines in the above passage are provided for the affiant officer to fill out. The words which are underlined were handwritten by the affiant officer in this case. All other words, including the "is" on which the Petitioners base their claim are printed. The affiant officer

testified that he informed the magistrate about the true state of affairs.(Tr. pp. 49-50)

In determining probable cause, the Court of Criminal Appeals did not quote this portion of the affidavit and obviously did not consider it. See Appendix "A" to the petition, pp. A-13-A-14.

SUMMARY OF THE ARGUMENT

1. The well established law is that one who shows no legal interest in the searched premises may not raise a claim based on such search. The Petitioners have never seen even claimed any interest in Mrs. Jones' apartment. Therefore, they have no standing to raise the claims they advance.

2. The Court of Criminal Appeals of Alabama correctly found that the affidavit established probable cause for the warrant. However, the standard of review of a search warrant is whether there was before the magistrate a substantial basis for concluding that the search would uncover evidence of wrongdoing. Clearly, that standard was at least met in this case.

3. The inaccurate word in the printed form was not intended to mislead and did not mislead the magistrate. In addition, such word was not part of the recitation of probable cause.

ARGUMENT

I

IN RE: STANDING

At no point have these Petitioners ever shown any interest in Sheila Jones apartment, the place searched under the warrant they attack.

Fourth Amendment rights are personal, and a party cannot complain about a search or seizure, unless that party's rights were violated by the police action. The principles of law are well established. For example:

> "...The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not be those who are aggrieved solely by the introduction of

> damaging evidence...." (Alderman v. United States, 394 U.S. 165, 171-172, 22 L. Ed 2d 176, 185-186, 89 S. Ct. 961 [1969])

More recently, this Honorable

Court wrote:

> "...It has long been the rule that a defendant can urge the suppression of evidence obtained in violation of the Fourth Amendment only if that defendant demonstrates that his Fourth Amendment rights were violated by the challenged search or seizure ...." (United States v. Padilla 508 U.S. ___, 123 L.Ed 2d 635, 640, 113 S. Ct. 1936, 1939 [1993])

See also Rakus v. Illinois, 439 U.S. 128,

58 L. Ed 2d 387, 99 S.Ct. 421 (1978);

United States v. Salvucci, 448 U.S. 83, 65

L. Ed 2d 619, 100 S. Ct. 2547 (1980), and

Rawlins v. Kentucky, 448 U.S. 98, 65 L. Ed

2d 633, 100 S. Ct. 2556 (1980). The auto-

matic standing rule of Jones v. United States, (362 U.S. 257, 4 L. Ed. 2d 697, 80 S.Ct. 725 [1960]), has been overruled. United States v. Salvucci, above, 448 U.S. 83, 85, 65 L.Ed 2d 619, 623-624; Rawlins v. Kentucky, above, note 2, 448 U.S. 98, 103, 65 L. Ed. 2d 633, 641. In addition, "...[c]o-conspirators and co-defendants have been accorded no special standing...." Alderman v. United States, above, 394 U.S 165, 172, 22 L.Ed 2d 176, 186. Brown v. United States, 411 U.S. 223, 36 L.Ed 2d 208, 93 S. Ct. 1565 (1973); United States v. Karo, 468 U.S. 705, 719-720, 82 L. Ed. 2d 530, 544-545, 104 S. Ct. 3296 (1984). This principle was reaffirmed recently in Padilla, above, wherein the Court wrote:

"...We applied this [standing] principle to the case of coconspirators in Alderman, in which we said:

'The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence. Co-conspirators and codefendants have been accorded no special standing' 394 U.S., at 171-172, 89 S. Ct., at 965-966...." (123 L.Ed 2d 635, 640-641, 113 S. Ct. 1936, 1939)

Moreover, one who would invoke the Fourth Amendment Exclusionary Rule must make a showing of standing. As this Honorable Court observed in Rawlings v. Kentucky, above:

"...Petitioner [Rawlings], of course, bears the burden of proving not only that the search of Cox's purse was illegal, but also that he had a legitimate

> expectation of privacy in that purse. See Rakas v. Illinois, supra, at 131, n 1, 58 L Ed 2d 387, 99 S. Ct. 421; Simmons v. United States, 390 US 377, 389-390, 19 L Ed 2d 1247, 88 S Ct. 967 (1968).... "(448 U.S. 98, 104-105, 65 L. Ed 2d 633, 641)

At no point did the Petitioners ever assert, to say nothing of prove, any legitimate expectation of privacy in Sheila Jones' apartment. Therefore, even if the Petitioners' complaints had any basis, they would have no right to demand the exclusion of the evidence found.

II

IN RE: PROBABLE CAUSE

The warrant in this case was based on an array of information from a variety of sources. The Petitioners argue that the magistrate was in error in finding of probable, since, at least in their opinion, what was before the magistrate was only enough evidence to establish suspicion. The Court of Criminal Appeals disagreed and found probable cause on the basis of the decisions and opinions of this Honorable Court. We submit that the Court of Appeals' ruling was correct.

However, the Petitioners avoid a more fundamental issue. The constitutional policy of the United States demands the

use of search warrants, unless exigent circumstances prevent such use. A direct implication of such policy is that searches under warrants are favored. As this Honorable Court wrote a generation ago:

> "...[The Supreme Court's] decisions reflect the recognition that the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants

> will tend to discourage police officers from submitting their evidence to a judicial officer before acting...." (United States v. Ventresca 380 U.S. 102, 108, 13 L.Ed 2d 684, 689, 85 S. Ct. 741 [1965]; emphasis supplied.)

Pursuant to this policy, search warrants are subject to only very deferential review. This is the clear teaching of Illinois v. Gates (462 U.S. 213, 76 L.Ed 2d 527, 103 S. Ct. 2317 [1983]), wherein this Court wrote:

> "... [W]e have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review. A magistrate's 'determination of probable cause should be paid great deference by reviewing courts.' Spinelli, supra, at 419, 21 L Ed 2d 637, 89 S. Ct. 584, 'A grudging or negative attitude by reviewing courts toward warrants, 'Ventresca, 380 US, at 108, 13 L Ed 2d 684, 85 S Ct 741, is inconsistent

with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant; 'courts should not invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner.' Id., at 109, 13 L Ed 2d 684, 85 S Ct 741.

"If the affidavits submitted by police officers are subjected to the type of scrutiny some courts have deemed appropriate, police might well resort to warrantless searches, with the hope of relying on consent or some other exception to the Warrant Clause that might develop at the time of the search. In addition, the possession of a warrant by officers conducting an arrest or search greatly reduces the perception of unlawful or intrusive police conduct, by assuring 'the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." United States v. Chadwick, 433 US 1, 9, 53 L Ed 2d 538, 97 S Ct 2476 (1977). Reflecting this

> preference for the warrant process, the traditional standard for review of an issuing magistrate's probable-cause determination has been that so long as the magistrate had a 'substantial basis for ... conclud[ing]' that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more. Jones v. United States, 362 US 257, 271, 4 L Ed 2d 697, 80 S Ct 725, 78 ALR2d 233 (1960). See United States v. Harris, 403 US, at 577-583, 29 L Ed 2d 723, 91 S Ct 2075...." (462 U.S 213, 236-237, 76 L. Ed 2d 527, 546-547; emphasis supplied.)

Compare the "substantial basis" language from Gates with the similar language quoted by the Petitioners at page 14 of the petition from United States v. Leon (468 U.S. 897, 915, 82 L.Ed 2d 677, 693 104 S. Ct. 3405 [1984]). See also Massachusetss v. Upton 466 U.S. 727, 733,

80 L.Ed 2d 721, 727, 104 S. Ct. 2085 (1984).

Obviously, the affidavit in this case provided, at a minimum, a substantial basis for concluding that a search of Ms. Jones' apartment would uncover evidence of wrongdoing.

III

IN RE: "IS"

In an effort to insure that they meet all of the requirements of the law, police officers are commonly provided with printed forms, which, if filled out correctly, will insure that once a warrant is issued, it will not be invalidated on technical grounds. Such a form was used in this case.

The requirements for a search warrant are, in the words of the Fourth Amendment:

> "...[N]o warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The section of the printed form used in this case for, "particularly describing the place to be searched, and the ... things to be seized", used the word "is". It is beyond dispute that the things described by the Officer in the provided blanks were the objects of the proposed search and that they were subject to seizure. It is likewise beyond dispute that the place to be searched, as described by the officer in the

appropriate blank, was the object of the probable cause. However, the Petitioners raise "is", which they claim is a willfully false statement by the officer and invalidates the warrant.

"Is" was not the officer's word at all but the word of the drafter of the form. If the word in the context of this case was inaccurate, it certainly did not mislead the magistrate, who had no doubt seen the form many times before and knew to look elsewhere in the form for the statement of probable cause. The inaccurate use of language is not the same thing as false swearing; if it was, our prisons could not hold all of the perjurers. The officer did not intend to mislead the magistrate and did not mislead

the magistrate. The officer's statement was not false.

On the other hand, first step in the application of the rule of Franks v. Delaware, (438 U.S. 154, 57 L.Ed 2d 667, 98 S. Ct. 2674 [1978]), is to determine if the allegedly false statement is essential to probable cause. As the Court wrote in Franks:

> "... [I]f, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required...." (438 U.S. 154, 171-172, 57 L.Ed 2d 667, 682)

The form executed by the officer in this case itself differentiates between the recitation of probable cause and the description of the place to be searched

and the things to be sought. It is the latter section, as already noted, which contains the word to which the Petitioners take exception. The recitation of probable cause does not contain that offending little word. In judging probable cause in this case, the Courts below considered only what was contained in the probable cause section and what the officer swore orally before the magistrate. The allegedly false "is" was not intended and should not be considered as part of the probable cause in this case. Thus, even if the Petitioners' claim had a basis in fact, it would not survive the first step of the Franks analysis.

CONCLUSION

In conclusion, the Respondent respectfully submits that there is no basis for the writ, and, therefore, the Respondent prays that the writ be denied.

Respectfully submitted,

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